principals of law doctrine. The Court of Appeals simply decided that it would not decide a question based upon a claim which was not plead in petitioners' Complaint.

The Court of Appeals affirmed the lower courts' grant of summary judgment with regard to petitioners' other causes of action without discussion. Those claims are not at issue in this petition.

CONCLUSION

Respondents Western New York Conference of The United Methodist Church and Reverend David Lubba respectfully submit that the Petition herein should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 04-1574

IN THE

Supreme Court of the United States

WENDE C. and DAVID C. (ANONYMOUS),

Petitioners,

v.

THE UNITED METHODIST CHURCH, NEW YORK WEST AREA; THE WESTERN NEW YORK CONFERENCE OF THE UNITED METHODIST CHURCH; DR. G. CHARLES TEN EYCK, Individually and in his capacity as Pastor of the HOSANNA JUNCTION UNITED METHODIST CHURCH; HAE-JONG KIM, Resident Bishop, THE UNITED METHODIST CHURCH, NEW YORK WEST AREA; DAVID LUBBA, District Superintendent, Rochester District, The United Methodist Church,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT HAE-JONG KIM

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QUESTION PRESENTED

Respondent Hae-Jong Kim objects to the question presented in the petition. The New York State Court of Appeals expressly held that the plaintiffs failed to plead a cause of action for breach of fiduciary duty and, as a result, the Court left open the question of whether such a cause of action may exist under different circumstances. To the extent that any substantial federal question is found to exist, the question presented to this Court is more appropriately phrased as: Does the neutral principles of law doctrine affirmatively require a state to recognize any particular cause of action in tort?

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Respondent Hae-Jong Kim respectfully opposes the petition for a writ of certiorari to review the judgment of the New York State Court of Appeals.

STATEMENT OF THE CASE

Petitioners initiated this action in the New York State Supreme Court, Monroe County, seeking damages based upon assault and battery, intentional infliction of emotional distress, clergy malpractice and negligent retention and supervision. [Pet'r App. A-29a-30a, D-42a-49a]. All of petitioners' claims arise out of a sexual relationship between petitioner Wende C. and respondent Dr. G. Charles T. (Pastor T.).

The Supreme Court, in a written decision dated August 26, 2002, granted summary judgment in favor of the defendants and ordered the complaint dismissed. [Pet'r App. A-11a]. On appeal, the Appellate Division, Fourth Department and, thereafter, the New York State Court of Appeals both affirmed the trial court's decision. [Pet'r App. B-19a-20a, C-33a]. The original decision of the trial court [Pet'r App. A-1a-12a], and the majority opinions of the two appellate courts [Pet'r App. B-13a-20a, C-29a-33a], correctly set forth the relevant facts and identify the legal issues involved in the resolution of this case.

Petitioners' statement of facts and characterization of the decisions rendered by the various New York State courts is inaccurate in several respects. Pursuant to Supreme Court Rule 15(2), and to avoid waiving the issue in the event that the petition is granted, these misstatements are briefly set forth below. The resulting impact of these misstatements on the jurisdiction of this Court to grant a writ of certiorari and the appropriateness of this case for review by the nation's highest court are discussed in greater detail in the following sections.

Factual Allegations

Petitioner begins by claiming that "[i]t is undisputed that the Petitioners received contemporaneous secular marital counseling from Pastor T.". [Pet. 2]. In fact, the trial court found that whatever counseling may have occurred between Pastor T. and Wende C. ended in the spring of 1999, and that after that point it was "impossible to establish a counselling [*sic*] relationship by the cumulative assertions in plaintiff's affidavit. No question of fact as to any such relationship exists. . . . 'counselling' [*sic*] was a convenient cover story should the two be seen together. The court gives it no more weight." [Pet'r App. A-8a-9a]. Thus, the trial court concluded that, during the time period relevant to the complaint, no counseling relationship existed.

In affirming that decision, the Supreme Court, Appellate Division, further concluded that any counseling which might have occurred was necessarily religious, and not secular, in nature. The Appellate Division held that Pastor T. "was not a therapeutic counselor with any state license or state-recognized credentials, but rather was merely a religious counselor. There is thus no basis for concluding that the pastoral counseling relationship and behavior in question may be regarded as essentially secular in nature." [Pet'r App. B-18a]. The New York State Court of Appeals also noted that the complaint identified the alleged relationship between Wende C. and Pastor T. as a ministerial relationship. [Pet'r App. C-32a].

Therefore, it is the clear holding of the New York State courts that, during the relevant time period, there was no counseling relationship between Wende C. and Pastor T. and, to the extent that any counseling relationship did exist, it was religious, not secular, in nature.

Petitioner's also claim that Wende C. was a "vulnerable parishioner" [Pet. 2] and that Pastor T. continually "expose[d] Wende C. to unwelcome sexual contact" "at a time when she was unable to consent." [Pet. 4]. These claims are also in direct contradiction to the facts as found by the New York courts. The trial court found no evidence that "would raise the implication that Mrs. Cleary was incapable of consent[ing]" to the sexual relationship. [Pet'r App. A-9a]. The Appellate Division, more explicitly, held that the evidence "establishes as a matter of law that the romantic attachment was mutual and the sexual contact consensual on the part of Wende C." [Pet'r App. B-15a]. Similarly, the Court of Appeals concluded "that as a matter of law the sexual relationship between the parties was indeed consensual" [Pet'r App. C-31a], and that "[n]o record evidence exists that either Wende C.'s physical or emotional condition or prescribed medication impaired her ability to engage in a romantic relationship with Pastor T. or to consent to his physical contact." [Pet'r App. C-32a].

In contrast to petitioners' assertions, the New York courts consistently and uniformly held that Wende C. was able to, and did, consent to the romantic relationship and physical contact with Pastor T.

With respect to respondent Kim, petitioners allege that: "On December 13, 1999, a member of the church wrote to Respondent Bishop Kim and informed him that she believed an inappropriate counseling relationship was occurring between Wende C. and Pastor T." [Pet. 3]. This allegation is simply false. As the trial court noted, this letter "deals with other parishioners and with matters far removed from this relationship. If the plaintiffs are referred to in this letter they are never mentioned by name." [Pet'r App. A-10a].

Characterization of New York Court Opinions

Respondent Kim also takes exception to petitioners' characterization of the decisions rendered by the New York courts in this case. These mischaracterizations are critical because they directly impact both the jurisdiction of this Court to grant certiorari and the appropriateness of this case for review by the United States Supreme Court.

Petitioners indicate that the Supreme Court granted summary judgment to the respondents, other that Pastor T., because they "had no notice of Pastor T.'s conduct, despite the fact that Bishop Kim received a letter from another congregant in [*sic*] or about December 13, 1999 expressing concern over the nature of the relationship between Pastor T. and Wende C." [Pet. 7]. As explained above, and noted by the Supreme Court [Pet'r App. A-10a], the referenced letter concerned other individuals, other matters, and did not mention either Pastor T. or Wende C.

With respect to the decision by the Appellate Division, petitioners omit a key aspect of the court's decision. Petitioners state that the court held that it "should not adjudicate the claims of whether Pastor T. breached his fiduciary duties. . . ." [Pet. 7-8]. The court so held, at least in part, because it

> conclude[d] that there is no meaningful analytical distinction between a cause of action for breach of fiduciary duty by a cleric and one for clergy malpractice. Therefore, for the same reasons that a cause of action for clergy malpractice is not cognizable, a cause of action for breach of

> fiduciary duty by a cleric may not be predicated on the allegations set forth in this case.

[Pet'r App. B-17a (internal citations omitted)]. New York does not recognize a cause of action for clergy malpractice "because any attempt to define the duty of care owed by a member of the clergy would result in excessive entanglement on the part of the court in matters of religion. [Pet'r App. B-16a (internal citations omitted)].

There are, however, two important elements of the Appellate Division's decision affirming dismissal of the supposed claims for breach of fiduciary duty which petitioners have failed to mention. First, the court did not specifically hold that New York would not, under any circumstances, recognize a cause of action for breach of fiduciary duty against a cleric. Instead, the court simply held that such a claim "may not be predicated *on the allegations set forth in this case*." [Pet'r App. B-17a (emphasis added) (internal citations omitted)]. Second, the court repeatedly noted that the plaintiffs had failed to plead a cause of action for breach of fiduciary duty. [Pet'r App. B-16a ("At the outset, we note that *the closest plaintiffs have come* to alleging a breach of fiduciary duty. . . ."); ("That *purported* cause of action. . . ."); B-17a ("plaintiffs' *unpleaded* claim for breach of fiduciary duty. . . .") (all emphasis added)].

Petitioners also omit these important holdings from their discussion of the decision by the New York State Court of Appeals. The Court of Appeals, even more explicitly than the Appellate Division, held that plaintiffs had failed to plead a cause of action for breach of fiduciary duty. The Court stated: "Moving next to plaintiffs' contentions that Pastor T. breached his fiduciary duties to them, we note that these causes of action were not specifically pleaded." [Pet'r App. C-32a]. [*See also* Pet'r App. C-33a (". . . no fiduciary cause of action is properly before us. . . .")].

Because no cause of action for breach of fiduciary duty had been set forth in the pleadings, the Court "le[ft] open for another day the question whether such a claim may arise between a cleric and a parishioner under very different circumstances, not present here." [Pet'r App. C-33a].

Thus, contrary to plaintiff's characterization, the New York courts did not hold that the First Amendment prohibits, in all instances, recognition of a cause of action for breach of fiduciary duty against a cleric. Instead, both the Appellate Division and the Court of Appeals specifically held that plaintiffs had failed to plead such a cause of action. Both courts also indicated that the specific facts of this case would not support such a cause of action, even were it recognized, and therefore deferred the question of whether or not New York might, under some other set of circumstances, recognize such a claim.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied because this Court does not have jurisdiction in this matter and, even if jurisdiction existed, there is no compelling reason to justify discretionary review by the United States Supreme Court.

I. JURISDICTION

The United States Supreme Court, as a federal court, is a court of limited jurisdiction. *See Pollard v. Hagan*, 44 U.S. 212, 216 (1845) ("This court, inexpressibly valuable to the country, is yet a court of limited jurisdiction."). The appellate jurisdiction of the Court is conferred by the Constitution, subject to "such exceptions, and under such regulations as the Congress shall make." U.S. Const. art. III, § 2. Various acts of Congress have affirmatively described the Court's appellate jurisdiction, "and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within" the applicable statutes. *Ex parte McCardle*, 74 U.S. 506, 513 (1868).

Therefore, in determining whether appellate jurisdiction exists, the case must satisfy two requirements. First, the case must fall within the jurisdictional limits expressly set forth in Article III, Section 2 of the United States Constitution. Second, the case must not be excluded from the jurisdictional reach of the Court as limited by acts of Congress. It is important to note that both requirements must be satisfied, as Congress does not have the authority to expand the Court's jurisdiction, but only to limit it beyond that which is conveyed